ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF	)	
	)	
IMPLEMENTATION OF SECTIONS 3(n)	)	**GN DOCKET NO. 93-252**
AND 332 OF THE COMMUNICATIONS ACT	)	
	)	
REGULATORY TREATMENT OF MOBILE SERVICES	)	

REPLY COMMENTS OF PACTEL CORPORATION

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November 23, 1993

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SUMMARY

In these Reply Comments, PacTel Corporation ("PacTel") supports the initial comments filed by many other parties that argued in favor of the Commission forebearing, to the maximum extent permitted by law, from the imposition of Title II regulation on commercial mobile service (CMS") providers. Conversely, PacTel demonstrates in these reply comments why, as a matter of sound public policy and consistent with its prior decisions, the Commission should reject the suggestion made by the National Cellular Resellers Association that wholesale cellular rates now be regulated.

With regard to establishing standards for the Commission to evaluate state petitions seeking authority to regulate CMS rates, PacTel explains that the suggested test proposed by the District of Columbia Public Service Commission is unlawful and unwise. Similarly, adoption by the Commission of the specific "factors" suggested by the New York State Department of Public Service for evaluating such state petitions is also unlawful because these "factors" would not reflect the new statutory standard. Instead, the Commission must carefully, critically, and quickly evaluate any state petitions that are filed to determine, in light of the dynamic nature of the market and the number of existing and potential commercial mobile service providers, whether market conditions are such that there is a realistic opportunity for carriers to charge CMS subscribers unjust, unreasonable or discriminatory rates. Furthermore,

consistent with the views expressed by many of those filing comments in this proceeding, PacTel believes that it is important that the commercial mobile services marketplace be allowed to grow and flourish by imposing a high level of justification on any state seeking to regulate the rates of CMS providers.

It is also important that CMS providers not have to provide interconnection to their networks to other carriers on a blanket, automatic basis. Rather, to comply with the requirements of Section 201(a) of the Communications Act and to promote active competition among CMS providers, the Commission should limit any interconnection requirements imposed upon CMS providers to decisions made on a case-by-case basis. Similarly, the Commission should immediately and totally reject the suggestion made by MCI that interexchange carriers be provided with access to certain highly confidential, proprietary database information regarding cellular customers. Granting MCI's request would be an unlawful deprivation of cellular providers' property rights and would greatly harm cellular consumers by eliminating much of the incentive to create these expensive, sophisticated databases that provide important, new innovative services to the public.

Consistent with the views expressed by the vast majority of commenters, PacTel also believes that it is unnecessary and would be counterproductive for the Commission to impose equal access requirements on CMS providers at this time. If, however, the Commission decides to explore this issue

further, it should do so by soliciting an additional round of comments on the Petition for Rule Making filed by MCI in order for the Commission to be able to focus carefully on the changing marketplace realities of the mobile services industry without worrying about the very tight time schedule imposed by Congress for resolving this regulatory parity rulemaking proceeding.

In defining private mobile services, it would be unlawful and irrational for the Commission to adopt the suggestion made by some parties that services that otherwise meet the definition of a CMS should instead be classified as private if they are not the "functional equivalent" of someone else's commercial mobile service. Rather, the legislative history made clear that Congress' intent when it excluded those services that are the "functional equivalent" of a CMS from classification as a private mobile service was to broaden the scope of the CMS classification and, conversely, to limit those mobile services that are exempt from potential regulation under Title II. Similarly, to ensure that similar services are regulated similarly the Commission should recognize that the scope of Congress' three-year transition period for those private services that are being reclassified as commercial mobile services is very narrow and applies only to those services and those customers that were actually being provided with "private" mobile services as of August 10, 1993. Finally, CMS providers should be permitted to provide dispatch services as there is simply no

adequate reason to deprive consumers of the benefits that will accrue from the increased competition.

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REPLY COMMENTS OF PACTEL CORPORATION

PacTel Corporation ("PacTel"), [1] by its undersigned attorneys, hereby submits its Reply Comments in response to the initial comments filed by other parties in this proceeding.

I. Title II Forbearance

Almost all parties filing comments in this proceeding support the Commission's proposal to forebear from applying Title II regulation to commercial mobile service ("CMS") providers. Support for forbearance is from virtually all corners of the telecommunications industry, including local exchange carriers, [2] an equipment manufacturer, [3] cellular carriers, [4] paging companies, [5] specialized mobile radio ("SMR")

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[1] Abbreviations used by PacTel regarding the identity of other commenters are set forth on Attachment A.

[2] See, e.g., GTE at 14-17; Rochester Telephone at 6-8; NYNEX at 18-22; Southwestern Bell at 27-29; TDS at 19-20; BellSouth at 28-31; U S West at 26-29; and Pacific Bell at 16-17.

[3] See, Motorola at 17.

[4] See, e.g., Century Cellunet at 5; New Par at 8-11; McCaw at 7-11; PN Cellular at 7; and Vanguard Cellular at 14.

[5] See, e.g., Allcity Paging at 2-3; Arch Communications at 11; Mobile Telecommunication Technologies at 13; Pagemart at 11-16; and Paging Network at 23.

companies, [6] and potential new entrants into the personal communications services market. [7] Even the National Cellular Resellers Association ("NCRA") recognizes that forbearance by the Commission from regulating retail cellular rates is in the public interest. [8] However, contrary to the views of virtually all other parties, NCRA requests that the Commission not forebear from regulating wholesale cellular rates "for the foreseeable future." [9]

NCRA's suggestion that the Commission regulate wholesale cellular rates must be rejected because it is not in the public interest. Ignoring the substantial body of contrary evidence and looking only to the past, NCRA claims that the Commission should regulate wholesale cellular rates because without active "regulatory oversight" there may not be a sufficiently "competitive cellular marketplace." [10] NCRA's old claims regarding lack of competition in the cellular industry are simply incorrect given today's competitive cellular marketplace

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[6] See, e.g., Nextel at 20-21; and Cencall at 7.

[7] See, e.g., Time Warner at 5 n.3, and Cox Enterprises at 8.

[8] NCRA at 17.

[9] Id. at 16.

[10] Id. In the past, NCRA also asked the Commission to exercise regulatory oversight regarding inter alia, cellular rates. That request was properly denied then, as it must be today. See e.g., Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1724-26 (1991).

and will be fundamentally wrong in tomorrow's highly competitive and crowded mobile telecommunications world.

In contrast to NCRA's bare, unsupported claims of lack of competition in the cellular industry, [11] the Cellular Telecommunications Industry Association ("CTIA") accurately explained -- citing substantial, current factual evidence -- that the entire mobile services marketplace, including cellular, is competitive and that providers of commercial mobile services clearly lack any real market power. [12] It is well recognized throughout the mobile services industry that competition among mobile service providers has become fierce both because of the introduction of new services and because of the entrance of new and expanded service providers. In addition, the already vigorous competitive environment within the mobile services

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[11] The lack of factual support for NCRA's claims is illustrated by its reliance upon a 1992 decision of the Public Utilities Commission of the State of California ("CPUC") regarding the unbundling of wholesale rates. See NCRA at 17, n.12. Strangely, although NCRA quotes from the CPUC's 1992 decision, the citation provided by NCRA is to the CPUC's 1993 decision that, in fact, granted applications for rehearing and stayed the CPUC's 1992 decision regarding these same issues. As the CPUC actually stated in its 1993 decision, it reconsidered the decision quoted by NCRA because, inter alia, "we now anticipate a far-reaching redefinition of the cellular market over the next few years. The impending entry of competitive non-cellular alternative carriers into the mobile telephone market will result in deep changes to the competitive aspects of the industry." Order Granting Limited Rehearing and Modifying D.92-10-026, CPUC Decision 93-05-069 (May 19, 1993) at 5. These same "deep changes" to the competitive aspects of the cellular industry because of new competitors and new services are important reasons why the Commission should forebear, to the maximum extent allowed, from Title II regulation of the entire CMS market.

[12] CTIA at 33-34. See also, Comcast at 13.

industry is becoming even tougher with the prospect of new competitors and innovative new services using the frequencies recently established by the Commission for personal communications services ("PCS"). As a result, there is simply no reasonable or rationale basis for the Commission to agree with NCRA and to conclude that mobile services -- either at the wholesale or retail level -- are not competitive. Rather, the Commission should promote the public interest by forebearing from the imposition of costly [13/] and anti-competitive rate regulation of the mobile services industry. [14/]

The comments filed by the CPUC illustrate further the problems of rate regulation of commercial mobile services. In its comments, the CPUC argues that cellular rates have not fallen in California and, therefore, the FCC should not forebear from rate regulation. [15/] As an initial matter, PacTel disagrees with the CPUC's claim that cellular rates have not fallen in California since, in fact, many cellular rates are now lower, both in absolute terms and as adjusted for inflation. [16/] In

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[13/] Not only is federal rate regulation a costly enterprise for the public and for those being regulated, but also, as even NCRA apparently recognizes, it is costly for the FCC itself. See NCRA at 15.

[14/] The anti-competitive aspects of governmental rate regulation has been demonstrated by studies showing that cellular rates are lower where there is no government rate regulation. See, e.g., CTIA at 21, n.53, 33-34.

[15/] CPUC at 6-7.

[16/] For example, since June 6, 1990 when the CPUC issued Decision 90-06-025 in its "Investigation into the Regulation of Cellular

(continued...)

addition, California cellular carriers have sought to lower consumers' costs by offering a wide variety of new and different pricing plans and promotional programs to meet individual calling needs. [17] However, to the extent that cellular rates may not have fallen as far or as fast as the CPUC would have liked, the evidence indicates that the reason is because of rate regulation itself. [18] For example, some attempts by cellular carriers in California to lower rates have been held up by protests filed by competitors such as cellular resellers who have sought to keep cellular retail rates high. In contrast, cellular carriers in other states where rate regulation has been eliminated are able to lower their rates to consumers quickly and without regulatory scrutiny or advance notice to their competitors. [19] Thus,

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[16] (...continued)
Radiotelephone Utilities," PacTel has introduced 17 new service plans in Los Angeles, 11 new service plans in San Diego, and 4 new service plans in the greater Sacramento Valley market. All of these new service plans provide customers with the opportunity to subscribe to cellular service at rates less than the existing basic service plan. In addition to new service plans, PacTel and other carriers have introduced promotions offering customers lower rates. Since the April 21, 1993 decision in which the CPUC modified its rate flexibility rules (Decision 93-04-058), more than 200 advice letters have been filed by cellular carriers and resellers introducing either new service plans or promotional programs that waive service establishment charges, provide rebates or credit on service, provide free airtime, and offer other reductions on the price of cellular service.

[17] Id.

[18] See, e.g., CTIA at 33, n.82.

[19] In particular, the CPUC's requirement that a minimum margin be available to resellers has been interpreted to require a plan-for-plan, rate-for-rate wholesale offset to each retail offering by facilities-based carriers. This kind of mimicry not only
(continued...)

California's experience demonstrates that cellular rate regulation has not been in the public interest and should not be adopted at the federal level.

II. State Petitions for Authority to Regulate Rates

In its Comments, PacTel explained that, regarding requests from states that the FCC authorize them to regulate mobile service rates, "it is vital that the Commission render its determinations on any state petitions as quickly as possible" and that "in evaluating whether states have made the requisite showing (that market conditions will not protect CMS subscribers from unjust, unreasonable or discriminatory rates), the Commission's analysis of market conditions must be dynamic, not a static, one." [20] Such an approach must take into account not only existing service providers but also "the impact of the new entry of services and providers that will occur . . . [including] the effect that the anticipation of new entry will have on the pricing conduct of commercial mobile service providers." [21]

Virtually all parties in this proceeding, with the exception of certain state regulators, agree with PacTel -- finding that it is important that there be a high level of justification by any state seeking to regulate the rates of

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[19] (...continued)
limits competition but also disincents price movement. See e.g., CPUC Resolution No. T-14607 (Sept. 25, 1991).

[20] PacTel at 19-20.

[21] Id.

commercial mobile services [22] and that there be an expeditious resolution of any state petitions. [23] In fact, even the CPUC recognizes that "Congress was concerned that rates charged for services rendered to the end users of mobile services should generally not be subject to state regulation unless such regulation is necessary to ensure just, reasonable and nondiscriminatory prices to such users." [24]

The District of Columbia Public Service Commission ("DCPSC") proposes that states be permitted to file petitions to regulate CMS rates if any one of three requirements are met:

(1) that 15% of basic service subscribers in any telephone exchange area do not have access to basic service from any telephone company other than a commercial mobile service licensee,

(2) that the rates for basic services offered by the commercial mobile service provider are higher than the rates by the pre-existing landline carrier, or

(3) that the commercial mobile service provider has market power in a relevant market. [25]

The Commission should not adopt the DCPSC's proposal because it is unlawful and improper.

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[22] See, e.g., GTE at 3, 24-25 (strong presumption against rate regulation if there are multiple commercial mobile service providers), Rochester Telephone at 2, 9-10; Naber at 17; Telocator at 25-26; CTIA at 36-39; McCaw at 23 (states need to provide empirical evidence in initial petitions that market varies from the national norm and provide concrete evidence of harm); and Motorola at 20.

[23] See, e.g., GTE at 3, 25; Naber at 18; Telocator at 25-26; and Motorola at 20.

[24] CPUC at 10 (emphasis added).

[25] DCPSC at 12.

As an initial matter, it is not clear what the DCPSC means by its suggestion that states be able to regulate the rates for commercial mobile services if "15% of basic service subscribers in any telephone exchange area do not have access to basic service from any telephone company other than a commercial mobile service licensee." PacTel assumes that the DCPSC proposal is limited to those very rare situations in which local exchange carriers provide connections to remotely located local customers by use of radio rather than wire because of the high cost of providing traditional landline service. [26/] However, regardless of the scope of what the DCPSC intended by its proposal, the proposed 15% standard is unlawful because it is inconsistent with Section 332(c)(3)(A) of the Communications Act.

The statutory standard created by Congress when it revised Section 332 was that a state could be authorized to regulate mobile service rates if, inter alia, the mobile service were "a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state." [27/] Fifteen percent of subscribers within a single telephone exchange area is certainly not the equivalent of

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[26/] See, e.g., Basic Exchange Telecommunications Radio service. It is unclear what the DCPSC means by its 15% standard in part because CMS providers do not have "basic service subscribers" in the same sense as that term is used regarding landline local exchange carriers. In addition, even if such services were provided by CMS carriers, they might not qualify as a "mobile service" if they are from a fixed location. See revised Section 3(n) of the Communications Act.

[27/] See Section 332(c)(3)(A)(ii) of the Communications Act (emphasis added).

"a substantial portion of the telephone land line exchange service within [a] state."

The limited scope of Section 332(c)(3)(A) and the fact that the DCPSC's proposal is inconsistent with that Section is made clear by the Conference Report. Specifically, the Conference Report states that it was:

> adopt[ing] the language 'substantial portion of the telephone land line exchange service' rather than either 'communications' or 'public' to more accurately describe the situation in which state authority to regulate commercial mobile services should be granted. For instance, the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of the service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means. [28/]

Because the DCPSC's proposal does not comply with this standard established by Congress, it must be rejected by the Commission.

Adoption of the DCPSC's second proposed standard, i.e., allowing states to regulate CMS providers at any time when their rates "are higher than the rates of the pre-existing landline carrier" also does not meet the statutory requirements established by Congress. Specifically, Congress limited the authority of states to regulate rates to only those situations, inter alia, where it can be shown that consumers are subject to

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[28/] Conference Report at 493 (emphasis added).

"unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." [29] For a wide variety of reasons, including higher operating costs associated with providing commercial mobile services and the establishment by some state public utilities commissions of below-cost rates for some basic landline services, the rates for mobile services are often higher than the rates for basic landline services. As the Commission is well aware, just because the rate for one service may be higher than the rate for another service does not mean that the higher rate is somehow unjust or unreasonable. Thus, because the DCPSC's second standard for allowing state rate regulation of commercial mobile services is not limited to addressing only those rates that may be unjust or unreasonable, it cannot be lawfully adopted by the Commission.

The third prong of DCPSC's proposed standard should also not be adopted because it is highly unlikely that there will ever be a situation in which "the commercial mobile service provider has market power in a relevant market." [30] Nevertheless, even if such a situation were to arise, the mere fact that a service provider has market power does not mean that its rates are either actually or potentially unjust or unreasonable. To comply with Section 332(c)(3)(A)(i), the state must demonstrate that actual "market conditions" are currently failing or will likely "fail to protect subscribers adequately."

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[29] Section 332(c)(3)(A)(i) of the Communications Act.

[30] DCPSC at 12.

Because the third prong of DCPSC's test is inconsistent with this Congressionally mandated standard, it also cannot be adopted by the Commission.

In its comments, the New York State Department of Public Service ("NYDPS"), expressed concern that there may not be sufficient, reliable data to determine the degree of competition in the mobile services market if a state were to file a petition to regulate mobile service rates. [31] As a result, it suggests that "the Commission should consider a number of interrelated factors" to determine whether a state has made an adequate showing pursuant to Section 332(c)(3)(B). [32] However, the approach NYDPS suggests cannot be adopted by the Commission because it does not focus upon the issues established by the statutory requirements of Section 332. As discussed above, Congress has authorized the Commission to permit states to regulate mobile service rates only if market conditions exist so that subscribers are not protected adequately from unjust and unreasonable rates or from rates that are unjustly or unreasonably discriminatory. The factors NYDPS suggests that the Commission consider, including the number of customers, the distribution of customers between firms, revenues, rates of return, and service quality information (i.e., complaints), [33] are largely irrelevant to the standard imposed by Section 332.

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[31] NYDPS at 15.

[32] Id.

[33] Id. at 15-16.

In contrast to NYDPS' assumptions, there are a wide variety of reasons why a carrier that charges reasonable rates and does not discriminate would attract a disproportionately large amount of customers, have substantial revenues and even above-average rates of return. Such results can be achieved by those carriers that are technologically innovative, well managed, and provide a superior level of service and satisfaction to many (but perhaps not all) of its customers. The Commission should seek to encourage such high quality innovative service providers. Because adoption of NYDPS' suggestion might discourage carriers from distinguishing themselves in the marketplace, the factors described by the NYDPS should not be adopted by the Commission as the basis for authorizing states to regulate mobile service rates.

III. Interconnection

Consistent with the positions taken by a wide variety of parties, [34] PacTel strongly opposes any blanket requirement that CMS providers be required to provide interconnection to their networks to other carriers. Those relatively few parties that argue in favor of requiring CMS providers to provide such interconnection arrangements primarily rely upon the argument

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[34] See, e.g., Southwestern Bell at 29, 31; BellSouth at 34-36 (no blanket interconnection requirement should be imposed upon CMS providers, it should be done on a case-by-case basis); New Par at 11; McCaw at 32; and Illinois Valley Cellular at 2-3. See also GTE at 22 (the Commission should defer consideration of requiring interconnection among CMS providers).

that common carriers always have an obligation to provide interconnection to all other carriers. [35]

In resolving this issue, the Commission must recognize that there is simply no universal, legal requirement that all carriers provide interconnection to any requesting carrier. Instead, Section 201(a) of the Communications Act permits the Commission to order carriers to "establish physical connection with other carriers" only "after opportunity for hearing" and only when the Commission "finds such action necessary or desirable [to further] the public interest." [36] Although it may be in the public interest to require those carriers that control true bottleneck facilities to provide interconnection to other carriers, that is simply not the case for competitive CMS providers.

Because there are already multiple CMS providers in most markets and, in those few markets where that may not yet be the case there is relatively easy market entry, CMS providers do not control bottleneck facilities. Furthermore, such a requirement would not serve the public interest given the cost

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[35] See, e.g., Ameritech at 10 (interconnection is an obligation and right for all common carriers); U S West at 33-34 (there is a reciprocal right and obligation to provide physical connection between all common carriers); NCRA at 20-23; and Pacific Bell at 19.

[36] Section 201(a) of the Communications Act.

and competitive disadvantages that would accrue if CMS providers were required to provide interconnection to other carriers. [37]

Rejecting the concept of requiring universal interconnection by all CMS providers is not only consistent with Section 201(a) and would be in the public interest, but also it would be appropriate because the Commission would still have the right to require such interconnections on a case-by-case basis. As a result, if a petitioning carrier were able to prove that, because of unusual and unexpected circumstances, a particular CMS provider actually controlled bottleneck facilities and that access to those facilities was required by the public interest to be provided to other carriers, then the Commission could require interconnection with that requesting carrier. However, absent such carrier-specific findings, the Commission should not require a CMS carrier to provide interconnection arrangements to other carriers and certainly it should not do so on a blanket, universal basis. [38]

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[37] Not only would providing mandatory interconnection to other carriers be costly and inefficient, it would also likely have anti-competitive ramifications. It would permit competitors to increase the costs of other carriers providing service and would diminish the incentives of CMS providers to create new and innovative networks and services since they would have to be shared with competitors.

[38] Of course, the Commission must also reject NCRA's suggestion that the Commission use its Expanded Interconnection decision as a model for governing interconnection rights among commercial mobile service providers. (NCRA at 20). As the Commission is well aware, its decision regarding expanded interconnection requirements for landline carriers is predicated upon those carriers controlling "monopoly telecommunications services." [38] Expanded Interconnection with Local Telephone

(continued...)

Similarly, MCI's suggestion that interexchange carriers be provided with "access to information stored in the mobile service providers' databases (the Home Location Register . . . and the Visited Location Register) . . . [and] to provide routing information access to all common carriers" must be rejected because it would be unlawful and bad public policy. By its request, MCI seeks access to highly confidential, proprietary information that cellular carriers create regarding their customers. As the Commission is well aware, the CMS market is already highly competitive and is becoming even more so every day. As part of this competition, CMS providers spend significant amounts of money to develop and use sophisticated databases regarding their customers so that they can provide the highest quality services. These databases have been, in fact, a significant tool used by competitive mobile service providers both to differentiate their services and to help them provide high quality, innovative, services to the public. Allowing other carriers, including competitors and potential competitors, to have access to this confidential information would result in a serious and unlawful deprivation of the property rights held by CMS providers and would hurt consumers by eliminating some of the incentives CMS providers have to create these types of expensive databases and to provide important, new innovative services to

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38/ (...continued)
Company Facilities, 7 FCC Rcd 7369, 7372 (1992). That is simply not the case regarding mobile service providers.

the public. Such a result would certainly not be in the public interest and must be rejected by the Commission.

IV. Equal Access

The vast majority of commenters oppose the suggestion that CMS providers be required to offer equal access to interexchange carriers ("IXCs"). Many of those commenters explained that: (1) it would be costly and inconvenient for end users if their CMS carriers were required to provide equal access; [39] (2) such equal access requirements are unnecessary; [40] and (3) it would be virtually impossible for some CMS providers to provide equal access. [41] Further, as many commenters also explained, the Commission has already begun consideration regarding equal access requirements for cellular carriers in response to a Petition for Rulemaking filed by MCI. [42]

If the Commission wants to continue to consider imposing equal access requirements on CMS providers, then it should initiate a further round of comments in the "MCI proceeding" where there are no Congressionally imposed short

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[39] See, e.g., TDS at 20; CTIA at 41-42, Illinois Valley Cellular at 3-4.

[40] See, e.g., Pioneer at 2, CTIA at 41-42; Telocator at 24-25; Cox Enterprises at 8-9; Liberty Cellular at 4-5; Illinois Valley Cellular at 3-4; Pacific Telecom at 2-3; PN Cellular at 4-5; and Vanguard Cellular at 20.

[41] GTE at 22-23.

[42] See MCI, Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, Petition for Rule Making (RM-8012), filed June 2, 1992.

deadlines for Commission action and the record can be adequately developed. Before making any substantive decisions regarding this issue, however, it is important that the Commission solicit further comment because much has changed since the initial round of comments were submitted regarding MCI's Petition. Not only have the types of commercial mobile services changed and expanded since MCI filed its Petition, but also the ease and frequency of consumers using dial-a-round numbers and access codes (i.e., 1-800 and 10XXX) have also changed dramatically.

V. Definition of Private Mobile Services and the Three-Year Transition Period

In determining whether a particular service is properly characterized as a commercial mobile service or a private mobile service, many parties agree that using Congress' definition, together with customer perceptions, would resolve most issues. [43] However, some commenters suggest approaches that are simply inappropriate or unlawful. For example, some argue that even if a particular offering meets the Congressional definition of a CMS, it still should be classified as a private mobile service if it is not the "functional equivalent" of someone else's commercial mobile service. [44] As explained in

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[43] See, e.g., Arch Communications at 4-6; Bell Atlantic at 4-14; BellSouth at 14-23, CTIA at 2-13; DCPSC at 4-7; General Communication at 1-2; GTE at 4-8; McCaw at 15-22; MCI at 4-6; Mobile Telecommunication Technologies at 4-10; NARUC at 8-20; New Par at 2-7; NYPSC at 4-8; NYNEX at 4-13; Southwestern Bell at 5-14; Sprint at 3-9; TDS at 4-11; USTA at 6-7; U S West at 2-5; and Vanguard at 2-8.

[44] Advanced Mobilecon at 7; American Mobile at 12; Time Warner at 6; RAM Mobile at 4-6; Geotek at 5-6; E.F. Johnson at 4-8.

our Comments, such an approach is both irrational and contrary to the legislative history. [45/]

Furthermore, RAM Mobile is incorrect when it attempts to limit those services classified as CMS providers to only those "providers of land mobile services that are, from a customer perspective, substantially identical to conventional cellular voice telephone service, but to leave as 'private' all other land mobile service providers." [46/] To the contrary, Congress made clear in its Conference Report that the definition of commercial mobile services encompasses "all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public." [47/] As a result, the definition of commercial mobile services should be broadly construed and must include services other than those that are substantially identical to conventional cellular voice telephone service. As a result, mobile data services such as those offered by RAM Mobile should be classified as commercial mobile services since they are, at least, the functional equivalent to -- and compete with -- other commercial mobile services.

[45/] PacTel at 7-8.

[46/] RAM Mobile at 1.

[47/] Conference Report at 496 (emphasis added). In contrast, the Conference Report also makes clear that the term "private mobile service" is limited to only those services that are "neither a commercial mobile service nor the functional equivalent of a commercial mobile service. . . ." (Conference Report at 496).

To protect those currently providing and receiving private mobile services from sudden disruptions of those services, Congress established a three-year transitional period for private land mobile services. [48] To promote competition, however, Congress carefully provided that this transitional period would cover only those private mobile services that were actually being "provided" by a party "before such date of enactment" of the legislation, as well as for "any paging service utilizing frequencies allocated as of January 1, 1993 for private land mobile services." [49] As a result, for non-private paging services, only those private land mobile services that were actually being provided as of August 10, 1993, are eligible for the three-year transition exemption. Conversely, the three-year transition simply does not apply to any non-private paging service that was not actually being provided as of that date, either because facilities had not yet been placed into commercial operation by then or because of any other reason. Of course, the exemption also cannot apply to any service, such as Enhanced SMR services, that are materially different from those private mobile services that were being provided prior to August 10, 1993. As a result, the three-year transitional period should apply only to those private services that were actually being provided on or

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[48] See Section 6002(c)(2)(B) of the Budget Act.

[49] See Section 6002(c) of the Budget Act.